

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10779 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

SADBHAV ENGINEERING LTD

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 10779 of 2004
MR UDAY JOSHI FOR M/S TRIVEDI & GUPTA for
Petitioner No. 1-2
MR JITENDRA MALKAN for Respondent No. 1
NOTICE SERVED BY DS for Respondent No. 2-3
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CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 04/03/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. This petition under Article 226 of the Constitution of India principally challenges the order No.03/2004 dated 12th August 2004 (Annexure "A") made by respondent No.2 and seeks a further direction that respondent No.2 may hear and dispose of appeal filed by the petitioner Company without insisting for pre-deposit of the amount in question.

2. Heard Mr.Uday Joshi for M/s Trivedi & Gupta on behalf of petitioner and Mr.Jitendra Malkan for respondents. RULE. Mr.Malkan waives service of Rule.

3. The petitioner Company is engaged in business of engineering and construction. On 18th April 2001, M/s Larsen & Toubro Ltd. awarded sub-contract to the petitioner Company for carrying out work of National Highway No.5 between 61 KMs to 98 KMs. It appears that, on 19th December 2000, M/s Larsen & Toubro Ltd. were awarded the main contract of National Highways Authority of India (NHAI) and in pursuance thereto, on 1st March 2001, a notification came to be issued by the Central Government bearing No.17/2001 granting exemption to various products whereunder at Srl.No.217 of the Table, exempted goods specified in List 11 required for road construction were exempted from payment of duty under the Customs Act, 1962 (the Act), subject to conditions mentioned at Srl.No.38.

4. The petitioner Company imported Asphalt Mixing Plant Model TSAP 2000 and filed Bill of Entry No.197440 on 9th August 2001 claiming benefit of the aforesaid exemption notification No. 17/2001. On 10th August 2001, NHAI had addressed a letter to respondent No.3 indicating its "No Objection" towards duty exemption on importation / custom clearance of the Asphalt Mixing Plant referred to hereinbefore and imported by the petitioner. It appears that the benefit of exemption would be available only when goods are imported by the designated agency as per condition No.38 of notification No.17/2001. The goods were cleared provisionally against bond with surety of M/s Larsen & Toubro Ltd., but the adjudicating authority found that the petitioner was not entitled to the benefit under the said notification on the ground that the petitioner had not fulfilled the condition at clause (iii) of Srl.No.38 of the said notification. In the circumstances, the assessment was finalized and the petitioner was directed to pay

differential duty of Rs.1,16,61,282/- after denying the benefit of exemption under the notification.

5. Mr.Joshi, the learned Advocate for the petitioner has invited attention to subsequent communication dated 27th August 2001 whereunder a declaration is made by NHAI to the effect that the agreement with M/s Larsen & Toubro Ltd. has been amended so as to add the name of the petitioner as sub-contractor of M/s Larsen & Toubro Ltd. as per provisions of the said agreement. That despite such addendum to the agreement and subsequent clarification dated 30th November 2001, the adjudicating authority, while passing the order in original on 15th January 2002, has chosen to ignore the said subsequent communication and adopted the stand that when the main contract was awarded by NHAI to M/s Larsen & Toubro Ltd. and also at the time of presentation of Bill of Entry, the conditions specified at Srl.No.38 of the notification are not complied with. In these circumstances, it was urged that the order of respondent No.2 authority, directing the petitioner to pay 50% of the duty demanded in cash and balance 50% to be secured by furnishing a bank guarantee was bad in law. That the said order be set aside and the petitioner be relegated to the appellate authority for establishing the case of financial hardship.

6. On behalf of the respondents, Mr.Malkan strongly opposed the submission and referred to and relied upon a decision of this Court rendered on 10th September 2004 in case of Sterlite Industries (India) Ltd. v. Union of India in Special Civil Application No.11489 of 2004, to submit that the powers available to an appellate authority are discretionary and once it is shown that discretion has been exercised by the said authority, this Court should not interfere.

6.1 To a pointed query raised by the Court as to what was the relief granted by the appellate authority in the circumstances, it was submitted that when the appellate authority directed furnishing of bank guarantee to the tune of 50% of the duty demanded, it amounted to granting waiver of pre-deposit. In other words, the submission was that as the petitioner was not required to make the payment in cash, it amounted to exercise of discretion granting the relief. Lastly, it was submitted that the petitioner had not placed anything on record to show except for the statement that payment of the duty demanded shall cause undue hardship.

7. On going through the impugned order dated 12th

August 2004 (Annexure "A"), one finds that paragraph No.1 reproduces a summary of the assessment order; paragraph No.2 refers to the appearance on behalf of the petitioner and the submissions made on behalf of the petitioner; paragraph No.3 states that the appellate authority has gone through the records of the case and thereafter reproduces Section 129E of the Act; and lastly, paragraph No.4 reads as under :

"I find that the duty amount confirmed by the lower authority in the impugned Order in Original has not been deposited by the applicants. No case has been made out by the applicants regarding financial hardship. Accordingly, the applicants are directed to deposit 50% of the demanded duty and Bank Guarantee for the balance amount before the proper officer, failing which the lower authority will be at liberty to take necessary action permissible as per law for recovery of duty from the applicants. Compliance of the order to be reported by 30-08-2004."

8. Section 129E of the Act states that in case where the decision appealed against relates to any duty and interest demanded or any penalty levied, the appellant is required to deposit with the proper officer the duty and interest demanded or penalty levied pending the appeal. However, under the first proviso, the Legislature has provided that where in any particular case the appellate authority, namely the Commissioner (Appeals) or the Appellate Tribunal is of the opinion that the deposit of duty and interest demanded or penalty levied would cause undue hardship to the appellant, the appellate authority may dispense with such deposit, subject to such conditions that may be deemed fit to be imposed so as to safeguard the interest of revenue. Therefore, on a plain reading of the provision, it is apparent that, before the appellate authority can insist on directing an appellant to pre-deposit the whole or a part of the duty, interest or penalty demanded, the appellate authority is required to apply its mind under the proviso as to whether the appellant has any prima facie case which would entitle an appellant to seek either full or partial waiver of the requirement to pre-deposit the duty, interest or penalty demanded. The legal position is well settled that the proviso carves out an exception to the main provision and in the present provision, this is abundantly clear. Under the main provision, before the appeal can be heard, deposit of the duty, interest or penalty is a pre-condition for the appeal to be heard on merits, but, under the proviso the appellate authority is granted a

discretion, which is required to be exercised in the context of factual matrix of a particular case.

9. Dealing with a provision under the Central Excise Act, 1944, namely, Section 35F of the said Act, the Apex Court in the case of Mehsana District Co-op. Milk P.U.Ltd. v. Union of India, 2003 (154) E.L.T. 347 (S.C.) laid down that the appellate authority is required to address his mind to the prima facie merits of the appellant's case and after being satisfied of the same, determine the quantum of deposit taking into consideration the financial hardship and other such relevant factors. In the said case, it was found that the appellate authority had not at all considered prima facie merits and had concentrated upon prima facie balance of convenience. The Apex Court found such an approach to be wholly unsatisfactory in absence of any reasoning assigned by the appellate authority.

10. Applying the aforesaid principles to the facts of the case, as can be seen from the extracts of the finding of appellate authority, the impugned order suffers from the vice of total non-application of mind as to the requirement of the provisions with special reference to the proviso to Section 129E of the Act. In fact, there is no whisper even as to what is the case of the appellant and what is the prima facie strength of such a case. In relation to the financial hardship, it is stated that no case has been made out by the appellant. Thereafter, the direction to deposit 50% of the demanded duty and bank guarantee for the balance amount before the proper officer follows. To adopt the phrase used by the Apex Court, the approach of the appellate authority is to say the least "wholly unsatisfactory". On going through the entire order, one does not find that the appellate authority is even alive as to what is the requirement of the provision, especially the proviso, and in the circumstances, it is not possible to state that it has exercised the discretion vested in it in accordance with law. In the circumstances, the impugned order dated 12th August 2004 (Annexure "A") is required to be quashed and set aside.

11. The decision of this Court, on which reliance has been placed on behalf of respondents, does not state anything beyond what is stated in this judgement, but on facts, it has been found that the Tribunal has rightly exercised its jurisdiction and passed a conditional order on merits before it. Therefore, the said decision does not carry the case of the revenue any further in the circumstances of the present case.

12. In the result, the petition is allowed. The impugned order (Annexure "A") dated 12th August 2004 made by the respondent No.2 is quashed and set aside. The petitioner shall be heard on its application for stay of recovery of demand and the appellate authority shall pass a fresh order after considering the law in this regard. In the circumstances, the interim relief granted by this Court shall continue till a fresh decision, that may be taken by the appellate authority in pursuance of this order is available. The petition is allowed to the aforesaid extent and stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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